

BEFORE THE INSURANCE COMMISSIONER
FOR THE STATE OF ARKANSAS

EMW CONSTRUCTION, INC.

PETITIONER

V. A.I.D. NO. 2008 049

TRAVELERS INSURANCE COMPANY

RESPONDENT

APPEAL BY PETITIONER FROM THE DECISION OF THE ARKANSAS WORKERS'
COMPENSATION APPEAL BOARD, ITEM NO. AR-AB-02-2008

This is in response to an appeal to the Insurance Commissioner from a decision of the Arkansas Workers' Compensation Appeal Board involving an assigned risk policy. The matter was argued before the Board on April 2, 2008. Upon a written decision being entered, the Respondent timely filed its petition for review of the Board's decision by the Commissioner, as allowed by law.

Petitioner is in the building contracting business and requires all its subcontractors to furnish proof of workers' compensation coverage prior to allowing them on the job site. A framing subcontractor failed to maintain coverage, resulting in an audit assessing premium to the Petitioner for the subcontractor's employees for the period after the lapse. The Petitioner does not contest additional premium is due for this lapse.

The conflict arose when the Respondent assessed the additional premiums at the Petitioner's class code, as if the subcontractor's employees were employees of the Petitioner. This resulted in a rate that was higher than the applicable class for the subcontractor's own employees. Respondent asserts that Rule 1 of the Arkansas Workers' Compensation Assigned Risk Plan requires premium be assessed in this manner. The National Council on Compensation Insurance (NCCI), the plan administrator, upheld Respondent's decision arguing Rule 1 requires the uninsured subcontractor's employees be placed in the same class in which they would have been placed under the Petitioner's policy; thus, the premium is calculated based upon the Petitioner's rate and not the rate of its uninsured subcontractor. The Appeal Board upheld that finding after a hearing.

Rule 1.D.3.d.2 purports to use the Petitioner's rate for the class when there is a lapse in the workers' compensation coverage of one of its subcontractors.

Uninsured subcontractors covered under the principal or general contractor's policy are classified on the basis of the classifications that would apply if the work were performed by the principal's or general contractor's own employees.

Arkansas Code Annotated §11-9-402(a) and (b) does not support this interpretation when, as in this case, there are different classes depending on whether the policy of the subcontractor or that of the Petitioner is responsible for the premium.

§11-9-402 (a) and (b) requires the Petitioner to indemnify the subcontractor by paying what the subcontractor would be required to pay in the form of benefits.

(a) Where a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor unless there is an intermediate subcontractor who has workers' compensation coverage.

(b)(1) Any contractor or the contractor's insurance carrier who shall become liable for the payment of compensation on account of injury to or death of an employee of his or her subcontractor may recover from the subcontractor the amount of the compensation paid or for which liability is incurred.

(2) The claim for the recovery shall constitute a lien against any moneys due or to be due to the subcontractor from the prime contractor.

(3) A claim for recovery, however, shall not affect the right of the injured employee or the dependents of the deceased employee to recover compensation due from the prime contractor or his or her insurance carrier.

The statute further provides the Petitioner the right to recoup all monies from the subcontractor that are paid on behalf of the subcontractor to the subcontractor's employee. Never does it make the subcontractor's employee an employee of the Petitioner for purposes of determining the proper class for premium.

Where there are distinct, observable conflicts between class codes because of the application of Rule 1, the proper code should be the one that best reflects the actual risk involved. In the instant case, the subcontractor's class better represents the actual risk the Respondent is bearing under its policy with the Petitioner.

To do otherwise would create excessive premium for the Respondent and, in the reverse situation, an inadequate premium. Further, carried to its logical conclusion, because the Petitioner may recover the premium it paid for the subcontractor's lapse, that amount would be in excess of what the subcontractor would have paid for its coverage had it not lapsed. Because the Petitioner may recoup this premium from the subcontractor, this would result in an unfairly discriminatory rate for the subcontractor versus its competitors.

The Board's decision is reversed and the Petitioner's request to pay at the subcontractor's rate shall be allowed.

Dated this 7th day of July, 2008

Julie Benafield Bowman

JULIE BENAFIELD BOWMAN
INSURANCE COMMISSIONER
STATE OF ARKANSAS